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JOSEPH A. SAWYER AND NELLIE A. SAWYER,
Plaintiffs in Error,

vs.

DANIEL A. PIPER,
Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR IN OPPOSITION TO THE MOTION TO DISMISS AND THAT TO AFFIRM.

E. V. CHELLIS AND J. A. SAWYER,
Counsel for Plaintiffs in Error.

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 225.

JOSEPH A. SAWYER AND NELLIE A. SAWYER,
Plaintiffs in Error,

Against

DANIEL S. PIPER, Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR IN OPPOSITION TO THE MOTION TO DISMISS AND THAT TO AFFIRM.

[Figures enclosed in brackets refer to folios in printed record.]

A full statement of the case will be found in my brief upon the merits. But certain errors contained in the statement of facts in the brief in support of the motion to dismiss or affirm call for correction. Some of the main mistakes are:

(1) That there is no controversy as to the facts. [Brief pages 10 and 23-24.]

(2) That plaintiffs in error remain in possession of the lands. [Brief, page 20, lines 9 to 16.]

(3) That respondent sought in the trial court a foreclosure of the equitable mortgage if denied relief upon the others. [Brief p. 7, lines 21 to 28.]

(4) That plaintiffs in error upon the first appeal asserted a full defense as against any foreclosure of the equitable mortgage. [Brief p. 8, lines 22 to 27.]

(5) That in the petition for modification of opinion and directions on remand plaintiffs in error prayed for an omission of the decision upon the second point made in that appeal. [Brief p. 9 lines 7 to 10. Fo. 78]

(6) That the proposed supplemental answer set up the same matter of election of remedies, as was submitted at the trial and first appeal. [Brief p. 9, lines 15 to 17.]

(7) Certain important facts are wholly omitted. Some of the omissions are:

(1) The foreclosure of the old mortgages would be for a sum $3,000.00 greater than could be had on the equitable mortgage.

(2) Prior to this action respondent brought ejectment to recover all these lands and damages, claiming under the contract and deed, pleading a forfeiture of the contract and all rights thereunder, leaving the deed absolute. They being by the trial court held to be an equitable mortgage, he moved to amend his pleadings and prayer for judgment so as to demand a foreclosure of such mortgage [15 to 17; 115 to 119; 127 to 129.] Immediately followed

by this suit, wherein his real cause of action and remedy were repudiated, and an ~~absolute~~ obsolete one insisted upon in order to force the $3,000 extra to be paid.

(3) From the facts and recitals in the contract it appears that when it was made it was the understanding to allow indefinite time to plaintiffs in error; the lands adjacent to a rapidly growing city and raising in value, would allow a sale of a part only to realize sufficient to pay the entire debt. But sales were rendered impossible by thus involving the lands in bewildering litigation. This accomplished, and the foreclosure sale made including the unwarranted $3000.00, and the sale papers recorded, respondent well supposed himself in a position to sweep the premises into his strong box. But to plaintiffs in error it was of supreme importance to avoid litigation, and get the title in condition to allow sale whereby, during the year allowed in Minnesota they could sell and save, over the sum justly due respondent, something for themselves. (See Stat. Minn. 1894, §6064, providing

> "The mortgagor, or those claiming under "him, shall have one year after the date of the "order of confirmation, in which to redeem the "premises sold, or any seperate portion thereof, "by paying the amount bid therefor, with inter- "est thereon from the day of sale.")

Hence this offer of judgment, desire to avoid litigation and efforts to compromise (88). This record does not show the many efforts made by them for a just settlement nor their unceremonious refusal by

respondent- Nor could this record show the further fact that a second foreclosure sale under the judgment hereunder reviewed was made, confirmed, and the sale papers recorded, and upon the expiration of the period of redemption thereof and more than one year before this writ of error was sued out, respondent ousted plaintiffs in error and has since remained in undisturbed possession of all these lands. Therefore I have procured certified copies of the certificate of sale and writ of possession with the sheriff's return of service thereof such copies filed herewith. No part of this matter was presented or considered at the trial or upon the first appeal.

The statement (3) above that a foreclosure of the equitable mortgage was sought in the trial court is directly contrary to the record. Its then refusal by respondent was unconditional and his whole case, both his proofs and argument, are to the point that the contract was forfeited and the sole existing securities were the old mortgages. See respondent's brief on motion, p. 6, line 30 and p. 7 line 8, and record, fos. 19-20. This position was insisted upon through both courts. The reference at line 28 p. 7, brief, is to a passage in my reply brief below, referring to their claim on appeal, while fully insisting upon the affirmance of the entire judgment, ~~is~~ to the rejected relief ~~if~~ the court held the old mortgages merged. Other of these mistakes and some further omissions may be considered later herein.

ARGUMENT AND AUTHORITIES.

A Federal question is presented.

The defense offered after the first remand did not exist at the time of the trial and the hearing upon the first appeal, and were in no manner then presented or offered. All that did exist and was presented is (1) The claim that under the pleadings and theory of the case a foreclosure of the equitable mortgage would be a departure. (2) Having in the trial court refused to accept the offered judgment for such foreclosure, respondent could not, on appeal, change his position and demand it. ~~No claim of any defense upon the merits, or in a proper action to secure such foreclosure, respondent could not on appeal, change his position and demand it~~. No claim of any defense upon the merits, or in a proper action, to secure such foreclosure was then made. My position is fully stated (1) in statement of Appellants' Positions No. 8 (54) and (2)in my then arguments (62-63 and 67-69). There was no trial after the first remand. Objection was made to the proposed supplemental answer and to all the evidence offered at the ~~pre~~perfunctory hearing, which only was had, upon the sole ground that plaintiffs in error were concluded upon any and all possible defenses by the former decision on appeal and directions to the trial court, (99 and 111-112) and sustained for that reason only (111-112 and 134). In his amended findings, (134) the trial judge states it thus "In ac- "cordance with said decision and judgment of the

"said Supreme court the former findings of this court "are hereby modified and amended as follows:" The proposed answer having been for this reason excluded, it was proper for plaintiffs in error at such preliminary, and practically ex parte hearing to offer to prove the facts constituting the defenses upon which they then relied. These facts are:—

(1) The pleadings and proceedings in the prior action show knowlege both of the law and facts in respondent, and that his insistence upon causes of action based on the old mortgages and the extra $3000 was in bad faith and intended oppression of his debtors. [This matter of the defense of mala fides and oppression did not come too late. The complaint not showing what plaintiff would rely on it was correct practice to offer judgment on the equitable mortgage. The plaintiff repudiating this, there was no opportunity to set up the above facts until after the remand, when it was done.]

(2) That he had persisted in his refusal of relief, based upon the non-enforceability of the equitable mortgage and that all the rights of the plaintiffs in error under that contract were forfeited, until final adverse judgment on appeal.

(3) That prior to the appeal the offer of judgment had been withdrawn.

[4] That by so persisting in relying solely upon his elected causes of action and his repudiation of the other until final adverse judgment upon them, he had elected his remedy and was bound by such election. The offer of full relief made in open court and remaining open and of record until the submission of

the cause, kept open to him the opportunity of full relief throughout the entire trial. His refusal alone prevented a full recovery therein.

[5] By the law against multiplicity of suits and the facts that he had had his "full day in court," that his entire proceeding was oppressive and in bad faith, there arose a defense resting upon the principles of estoppel and res judicata. [As to the validity of these two defenses stated in [4] and [5], see Warner vs. Godfrey 186 U. S. 365; also my main brief and argument.] The fact that a hearing upon these new defenses was denied, is both patent and admitted. That they could not have been earlier offered results both from the fact that they did not then exist, and that by repudiating all claim on that ground respondent deliberately excluded all defenses from presentation or consideration.

The rule in Swafford vs. Templeton, 185 U. S. 487-493, reaffirmed and held applicable in cases of writs of error from state courts in Brown vs. Lite Society [No. 320, Oct. term 1902[23 S. C. R. 123-124, applies here. The basis of jurisdiction here is the claim and admitted fact that plaintiffs in error were denied opportunity to present, and refused consideration of, their alleged defenses. This was no part of the original litigation. It arose after the remand on the first appeal. It is wholly Federal in its character. Whether or not those proffered defenses were good, it was the duty of the state courts to decide in proper and adequate proceedings. [Sec. 5270 Laws of Minnesota, 1894, reads thus; "The plaintiff and defendant, respectively,

"may be allowed, on motion, to make a supplemental "complaint, answer or reply, alleging facts material "to the case, occurring after the former complaint, "answer or reply" Under this statute it was held in Malmsten vs. Berryhill, 63 Minn. I, that the filing of such pleading was matter of right and not of discretion.]

Malmsten vs. Berryhill, 63 Minn. 1

It follows that any consideration of its merits was required to be had in the usual manner, on demurrer or motion. also that plaintiffs in error would have power to amend the answer if it was found defective.]

But while this court, jurisdiction being already vested in it, may examine this record to determine whether the conclusion of the state court is justified, such examination is in the exercise of and not a condtion of jurisdiction.

Kelley vs. Rhoades, 23 S. C. R. 260, No. 93 Oct. Term 1982.
Blythe vs. Hinkley, 180 U. S. 333.

Yet a correct decision therein by the state court could not affect the jurisdiction.

Andrews vs. Andrews, 23 S. C. R. 237, No. 23, Oct. Term 1902.

It was long since settled that a decision by a

state court, that it has not passed upon a Federal question, or had decided one correctly, does not affect either the fact or the extent of the jurisdiction of this court.

McCullough vs. Virginia, 172 U. S. 102.
Columbia Power Co. vs. Columbia Ry. Co. 172 U. S. 475.
Missouri Etc., Ry. Co. vs. Elliott, 184 U. S. 695.

It follows that even were the closing portion of the opinion of the Supreme Court here reviewed not purely obiter it yet would not affect the jurisdiction of this court. It is no more than an attempted justification of the refusals to hear the defenses. But this portion of the opinion (bottom of p. 102 and top of p. 103, record) is only a casual expression of the views of its writer upon a matter not then before the court. That court had already *decided* that the rule of "the law of the case" applied and not only bound the appellants, but the court as well. Its words are "The identical question presented by the "proposed supplemental answer was presented and "argued to this court upon the former appeal, and "decided adversely to appellants, and is therefore, "*res adjudicata*. That decision became the law of "the case, and cannot be reconsidered on this ap- "peal." The rule of "the law of the case" has ever been enforced in Minnesota.

Bradley vs. Norris, 67 Minn. 48.

Teryll vs. Faribault, 84 Minn. 341.

It is also plain that as stated in the opinion the sole parts of the defenses here considered is the matter that was in the record on the first appeal. For a discussion of the claim that the latter portion of the opinion, considered as applicable to the entire defenses presented is yet fatally defective both in assuming as facts matters the record shows have no existence and in omitting from all consideration controlling facts shown by the record, resulting in holding contrary to the settled law of that state, and in its essence still denying due process of law, see my printed argument on file herein, on that topic.

There is absolutely nothing in the brief supporting this motion (p. 17, paragraph 3) that this Federal question was raised too late. The opinion of the State Supreme Court, showing as it does that the refusal to hear these offered defenses by the trial court (based as it is solely on res judicata) was by the Supreme Court affirmed on that precise ground, shows on its face that this Federal question was in fact considered and decided by it. That is sufficient, though the record did not show any further fact.

Meyer vs. City of Richmond, 172, U. S. 82.

Bellingham Bay Co. vs. City of New Whatcom, 172 U. S. 320.

Columbia Power Co. vs. Columbia Ry. Co. 172 U. S. 475.

Chicago Ry. Co. vs. Chicago, 166 U. S. 266, et seq.

Independently of this the statement is untrue. It could not have been set up before the decision on the first appeal. It was set up (1) In the proposed answer (97-98). (2) In assignments of error (2nd appeal) Nos. 7, 8 and 9 (142). (3) In the 5th position as stated in that brief (144 p. 80) [4] In that main brief (153). [5] In the oral argument (209).

The petition for modification of the opinion and the directions, first appeal, is immaterial here.

[1] The rules of that court defining the cases wherein such cases will be considered are quoted in my main brief page 4, and forbid consideration of this petition. Many of the facts relied upon were not in that record (79-80). [2] That Supreme Court is one of appeal. It does not consider matters not passed upon by the trial court. (3) The petition called in question only the correctness of the opinion and direction to the court. This is not ground which that court will consider. See rules, in main brief. (4) The denial of the petition is general. To construe it as intended to pass upon the merits is to presume that all its rules were violated by that court. (5) Upon mere motion for a rehearing that court pays no attention to new matter, (Smith vs. St. Paul, 69 Minn. 276,) and often not too much to that in the record. A ruling therein is not the equivalent of a decision on a matter directly presented upon the appeal. (6) To warrant a dismissal here it *must clearly appear that the state court did in fact properly consider and decide this matter.*

See Life Ins. Co. vs. Brown, 23 S. C. R. at page 124.

It does not so appear here, but at best there is a mere conjecture of some sort of consideration. In its final holding of res judicata that court relies solely upon the original opinion and directions, and the record then before it. There is no reference to this petition or to its denial, both which were filed after that decision was made.

As to the motion to affirm: (1) The claim of delay. The law gives two years in which to sue out a writ of error. No ground for the charge of delay is found in the compliance with this statute. But the attempt calls for further answer. In his complaint in this action (top p. 7, record) respondent alleged that both these plaintiffs in error were insolvent. While that was untrue it is a fact that they were in close circumstances and, as shown above, very desirous to avoid litigation. The latter could only be most disastrous to them in this case, for they desired to save something out of their lands. Succeeding in reversing the judgment which was too large by $3000, but which left the lands so tied up as to make immediate sales, save when made by consent of both parties, difficult if not impossible, they again sought to settle the matters. But with those directions still remaining in that decision it was clear to them that the respondent would do just what in fact he did do, loftily refuse to consider any proposition for settlement. To avoid this, was the object of fil-

ing that petition, and the fact was therein plainly stated. With the failure to obtain the desired modification plaintiffs in error were compelled either to give up everything or carry on the suit. It is admitted in this brief that they then informed counsel that in case a hearing upon their defenses was denied, they intended to put the Federal question thereby raised into this record. It was inserted in the proposed answer, and thereafter continually throughout the proceedings. Now, if counsel and their client were seeking no more than their legal rights, and did not care to leave open a road to this court, they would have made no objection to the proposed answer and defences, but would have had the court formally consider and decide upon them. In that case no writ of error would have been possible. Instead they intelligently resisted, and succeeded in preventing any presentation or consideration of the asserted defenses, thus knowingly and intentionally opening the way whereby plaintiffs in error could remove the case to this court. But with plaintiffs in error the case stood far differently. It was to them then reasonably clear that both state courts would refuse them any hearing. Their sole hope lay in a review by this court. But not from choice, only from necessity, did they wait. The necessary expenses must be procured. Possession of all the lands was taken by respondent—necessity still compelled a further delay of a year. Having full possession, and being at all times informed of the intent to take out this writ, and having knowingly made that possible,

how is respondent prejudiced, even if there were delay?

I think both motions should be denied.

All of which is respectfully submitted.

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